

STATE OF CONNECTICUT

DOCKET NO. HHD-CV-19-6115433-S : SUPERIOR COURT
IN THE MATTER OF : J.D. OF HARTFORD
RUTH STRONG APPEAL FROM : AT HARTFORD
NEWINGTON PROBATE COURT

AND

✓ DOCKET NO. HHD-CV-19-5062776-S : SUPERIOR COURT
IN THE MATTER OF : J. D. OF HARTFORD
RUTH STRONG : AT HARTFORD
APPEAL FROM PROBATE COURT

JUNE 30, 2021

MEMORANDUM OF DECISION RE: APPEALS FROM PROBATE

Before the court in the present consolidated appeals of decrees following hearings on the record of the Probate Court for the judicial district of Newington, *Randich, J.* (the Probate Court), is the appeal of the plaintiff, Ruth Strong, formerly an involuntarily conserved person, from the order of the court that: (1) approved the final accounting of Strong's former conservator, Lisa Foy; (2) granted Foy quasi-judicial immunity from suit; and (3) subsequently approved a settlement of a third party claim without imposing a surcharge on Foy that would have obliged her to pay the cost of the settlement. In general, Strong asserts that Foy mismanaged her financial affairs by failing to take advantage of permissible expenditures in the course of a Medicaid "spend down," failing to protect her assets by not funding a special needs trust or exploring available home care programs that would have sheltered Strong's assets while providing her with home care, and exposing Strong to liability for nursing home care that was not covered by Medicaid. The court affirms in part and reverses in part.

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The following facts and procedural history are relevant to the present consolidated appeals.¹ On March 22, 2017, the Probate Court for the judicial district of Hartford, *Smith, J.*, received evidence on a petition for an involuntary appointment of a conservator of the person and estate of Strong. At that time, Strong, then seventy-three years old, was hospitalized at St. Francis Hospital in Hartford, Connecticut. The court received testimony that Strong: (1) had been hospitalized eight to ten times in the last two years for several falls at home; (2) had refused services in the community; (3) was unable to understand and make appropriate decisions regarding her medical care; and (4) needed assistance in navigating her finances. On March 23, 2017, the court appointed Foy as the conservator of Strong's person and estate pursuant to General Statutes § 45a-650.²

On March 25, 2017, Foy placed Strong in the Hebrew Center for Health & Rehabilitation (the Hebrew Center), which provided in-patient long-term care services. Despite the mandate of General Statutes § 45a-655 (a)³ providing that a conservator of an involuntarily conserved person is to file an inventory of the conserved person's estate within two months of appointment, and an order in the March 23, 2017 decree to the same effect, Foy did not file an inventory of Strong's estate until February 18, 2018. On or about May 11, 2017, Foy transferred \$42,827 from a bank

¹ The facts described herein are derived from testimony and evidence received by the Newington Probate Court at hearings conducted on the following dates: (1) December 11, 2018; (2) January 28, 2019; (3) March 11, 2019; (4) March 27, 2019; (5) April 23, 2019; (6) September 10, 2019; and (7) October 13, 2019. The facts are also derived from the record provided by the Probate Court pursuant to General Statutes § 45a-186a (a), as well as the decrees of the Newington Probate Court dated July 11, 2019 (Strong I) and October 31, 2019 (Strong II), from which these appeals are taken.

² General Statutes § 45a-650 (f) (1) provides that "[i]f the court finds by clear and convincing evidence that the respondent is incapable of managing the respondent's affairs, that the respondent's affairs cannot be managed adequately without the appointment of a conservator and that the appointment of a conservator is the least restrictive means of intervention available to assist the respondent in managing the respondent's affairs, the court may appoint a conservator of his or her estate after considering the factors set forth in subsection (g) of this section."

³ General Statutes § 45a-655 (a) provides in relevant part that a "(a) conservator of the estate appointed under section . . . 45a-650 . . . shall, within two months after the date of the conservator's appointment, make and file in the Probate Court, an inventory, under penalty of false statement, of the estate of the conserved person, with the properties thereof appraised or caused to be appraised, by such conservator, at fair market value as of the date of the conservator's appointment."

account in Strong's name to a trust fund account. With the exception of \$200 in personal property, that sum represented the entirety of Strong's assets.

Strong remained in-patient at the Hebrew Center until March, 2018. Medicare paid for expenses charged by the Hebrew Center from Strong's admission in March, 2017 until April 6, 2017, and from July 28, 2018 through August 2, 2018. Foy applied for Medicaid insurance on behalf of Strong which was approved in November, 2017, with coverage retroactive to July, 2017. Because qualification for Medicaid at all relevant times required assets no greater than \$1600 in any given month, Foy elected to "spend down" Strong's assets by paying the Hebrew Center bills for the portion of April not covered by Medicare, specifically May, 2017 and June, 2017, from the funds that Strong had available at the time of the involuntary appointment and Strong's monthly social security benefits. During the time Medicaid covered the cost of the Hebrew Center, Strong was required to contribute what is known as "applied income" to her medical care. Applied income is, in effect, a co-pay of a beneficiary's monthly income in excess of \$60. The amount of the applied income payment is based on a beneficiary's income minus qualifying expenses. Those expenses potentially include what Strong refers to as a "rental diversion," (the cost of maintaining the beneficiary's home), medical expenses such as dental work, and a prepaid funeral contract and burial plot. Moreover, Strong claims that Foy did not apply for a "rental rebate."

The Probate Court received testimony that rental rebate was provided after Foy was discharged as conservator. Foy did not apply for the rental diversion because of the belief, based on her conversation with a social worker from the Hebrew Center, that the latter would undertake the application. Foy did not pay for the dental work because she was told by a social worker that the Hebrew Center had a dental provider that would provide such dental work. Foy did not

pursue a prepaid funeral contract or burial plot because she was ultimately told by Strong that she did not want one. Foy also did not consider establishing a special needs trust or exploring available home care programs that would have sheltered Strong's assets while providing her with home care. Foy did not discuss the option of either because it was her understanding, based upon communications with social workers at the Hebrew Center, that Strong would not be a candidate for release from residential long-term care.

Foy was discharged as conservator of Strong's person and estate in July, 2018, at the request of Strong. Attorney Robert Hale was appointed as the successor conservator of Strong. On October 22, 2018, Foy filed a final accounting covering the period of her conservatorship from March 23, 2017 to July 31, 2018. Strong objected to the court's approval of the final accounting on the grounds that the effect of such approval would bestow quasi-judicial immunity upon Foy barring any liability from suit by Strong for claims of negligence in the performance of her duties as Strong's conservator. Moreover, in Strong's view, there were moneys for which no proper accounting was made.

Foy testified that she had indeed attempted to discuss with Strong the management of her money at least to the extent that she raised with Strong the potential purchase of prepaid funeral expenses. Foy explained that on her first meeting with Strong, the latter was experiencing sufficient cognitive difficulty such that Strong was unable to properly communicate her wishes. On the second attempt, according to Foy, Strong adamantly opposed the purchase. To the contrary, Strong provided testimony that Foy had never raised that issue with her and that had Foy done so, Strong would have acceded to the proposal. Indeed, Strong testified that Foy never discussed the general management of her funds with her.

The record of the hearing held on January 28, 2019, reveals that with the exception of two bank checks written by Foy to the Hebrew Center and one bank check or money order made payable to the Hebrew Center in the amount of \$1000, all funds that came into Foy's control by way of her involuntary conservatorship of Strong had been accounted for. By the conclusion of the hearing on March 27, 2019, it became evident that the two checks that were unaccounted for had been received by the Hebrew Center while the other bank check had been cancelled and another bank check for the same amount of \$1000 was deposited in the trust funds of Attorney Hale. Although not entirely clear from the record, it appears that Foy received no compensation for her work done on behalf of Strong.

The Probate Court received expert testimony from Attorney Sharon Pope on the issue of the standard of care in the practice of elder law. Pope testified that the standard of care in the representation of conserved persons, such as Strong, involved formulating a strategy for spending down assets of the conserved person to qualify for Medicaid. The standard of care, according to Pope, required the conservator to ascertain the wishes of the conserved person in terms of the spending of their available assets and then to advise such conserved person of the available choices permitted in the context of Medicaid-qualification for the spend down. Such would include alerting the conserved person of the ability to prefund funeral arrangements, the purchase of personal items, the consideration of funding a special needs or pooled trust type vehicle, and the payment of medical expenses not covered by insurance.

Thonya Keyes, a former representative of the Hebrew Center, testified on March 11, 2019, that there was an outstanding balance owed to the Hebrew Center in the amount of \$1941.22. That amount was not covered by Medicare, Medicaid or payments from Strong's funds. Keyes testified that what Strong referred to as "rental diversion," an adjustment of total

gross income by certain deductions to calculate the amount of a Medicaid recipient's income that is to be applied to the monthly cost of care by the Department of Social Services, is not typically applied for by the Hebrew Center and, moreover, was not done so in Strong's case. According to the Department of Social Services, Uniform Policy Manual § 5035.20, a deduction from gross income is permissible for the cost of maintaining a home in the community in a monthly amount not to exceed \$650, and is limited to six months. Keyes further testified that the debt to the Hebrew Center is based on insufficient applied income that was paid on behalf of Strong.

On July 11, 2019, the Probate Court issued its decree approving the accounting (Strong I). The court expressly released Foy from liability as to all activity reflected in her final financial report, in essence her accounting of all funds expended on behalf of Strong. The Probate Court found that Foy had managed assets of \$57,822.28 that included Strong's initial cash on hand, social security income and interest. The court found that Foy had expended \$57,594.22 on behalf of Strong, which included payments to the Hebrew Center in the amount of \$47,714.48, housing costs in the community, cash payments to Strong for personal expenditures, and fees to Attorney Hale as successor conservator.

The Probate Court also addressed the claim by Strong for a "surcharge" for Foy's "alleged malfeasance in the discharge of her conservator duties." Strong's claim primarily consisted of not preserving Strong's assets by pursuing a strategy of "spending down" the available initial cash on hand to reach Medicaid eligibility by making Medicaid acceptable exempt expenditures that would have preserved Strong's funds for her own use. Strong I, pp. 2-3. As previously described, that included, but was not limited to, prepaid funeral expenses and the funding of a pooled trust. Strong additionally objected to the accounting on the grounds that Foy should have attempted to return Strong to the community through the use of programs such

as “Money Follows the Person” that the Probate Court found may be accessed only after assets are spent down so as to qualify for Medicaid coverage. Strong asserted that the initial Medicaid approval for a skilled nursing facility stay for only 120 days supported her claim that she was a candidate to return to her home. Strong I, p. 3.

The Probate Court was not persuaded. The court found relevant a report entitled, “Preadmission Screening and Resident Review, summary of Findings Report” performed on May 17, 2017, which provided that “somewhat close in time to when the conserved person met with the petitioner,” Strong experienced “lability, sadness, delusions, paranoia, anxiety, worry, verbal aggression, irritable behaviors, withdrawn behavior and distrust.” Strong I, p. 3. That behavior reflected, in the Probate Court’s view, Foy’s testimony of her observation of Strong during the same period. The court credited Foy’s testimony that she discussed a prepaid funeral expense, but Strong “failed and/or refused to direct the petitioner to make such arrangements.” Id.

The Probate Court next considered Strong’s claim that Foy should have considered funding a pooled trust. The court accepted Foy’s testimony that it was far from clear that Strong “would be leaving skilled nursing care.” Strong I, p. 3. The court recognized that it was possible for Strong to fund a “special need’s trust while in a skilled nursing facility,” and concluded that “this is a strategy in the court’s experience which is seldom employed and the court cannot, as a matter of law, find that the petitioner was legally bound to file for a special needs trust under these facts.” Id.

The Probate Court continued its analysis. “Moreover, it is not at all clear to the court that there would have been many assets to put into a trust had such a strategy been followed. The petitioner testified that while she knew the conserved person had money at Bank of America, she

did not know the exact amount until she went to the bank to withdraw it and transfer it to a Farmington Bank account on May 11, 2017. This transfer occurred within the sixty day time period for the petitioner to gather the assets and file an inventory with the court but, as the conserved person notes, the petitioner failed to file an inventory until February of 2018. By May 11, 2017, the conserved person had already incurred Hebrew [Center] charges for March, April and May, 2017. Further, as the conserved person notes, had the petitioner timely filed her inventory and disclosed the existence of the assets, the conserved person would have lost her indigence status and the petitioner could have been required to reimburse the court fees and expenses previously waived and further pay both herself and counsel for the conserved person. See Probate Court [Rules], Rule 33.19. The court further could have set a bond which the funds of the conserved person would have had to pay. By the time the petitioner retained and paid counsel to file a motion for special needs trust and had it scheduled for a hearing by the [P]robate [C]ourt, there well may not have been any funds left to fund such a trust. Accordingly, the court is unable to find based on these facts that the failure of the petitioner to fund a special needs trust constitutes a basis to surcharge the petitioner.” Id.

The Probate Court addressed Strong’s claim that Foy failed to apply for a rental diversion which would have permitted her to expend funds for her apartment while in a skilled nursing facility, such as the Hebrew Center. The decree by the Probate Court provided: “Essentially, a rental diversion allows the conserved person to continue paying for her apartment while she is in a skilled nursing facility so that she can return to it once she leaves the skilled nursing facility.” Strong I, p. 4. In its decision, the court noted that Foy never applied for the rental diversion because she believed that the Hebrew Center would do so although in fact no such application was made and, according to the court, the funds that would have been realized or saved “forms

the basis for the [Hebrew Center's] claim that the conserved person has a balance due." Id.

Moreover, the court, noting that only a demand letter, not a lawsuit, had been issued and that the "conserved person has a good defense based on the circumstances," allowed Strong "to bring a claim of contribution against the petitioner if she is ever sued by the skilled nursing facility for the claimed debt." Id.

The Probate Court considered Strong's claim of malfeasance on the basis that Foy had not pursued a rental rebate. Because Attorney Hale, the current conservator, had obtained the rebate, it concluded that such failure had not caused Strong any damage. The court further declined to order an audit of the accounting of Foy's final accounting on the grounds that she had "fully explained how much money the conserved person had and received during the conservatorship, how it was expended and how much she turned over to the new conservator." Strong I, p. 4. Finally, the Probate Court released the conservator "as to all activity evidenced in the Final Financial Report" and denied any claims for surcharge for failure to perform estate planning for Strong and the failure to pursue a rental rebate.⁴ The court excluded from the release a potential "claim for contribution" against Foy if Strong was sued for the balance due to the Hebrew Center due to her stay from March, 2017 through March, 2018. Id., p. 5. Strong appealed to this court from that decree.

Hearings on, inter alia, a motion to compromise the Hebrew Center debt were held on September 19, 2019 and October 31, 2019. Attorney Hale had secured a compromise of the Hebrew Center debt in the amount of \$1000. Strong did not oppose the compromise, but asserted that Foy should be surcharged for the amount of the settlement. Moreover, Strong objected to the use of the \$1000 in the uncashed bank check as the funds for the settlement.

⁴ Strong had also requested a surcharge for the loss of certain documents such as her social security card, but the record reflected that Foy had secured the replacement of those documents.

The Probate Court granted the motion to compromise the claim using the \$1000 from the lost bank check which had been reissued. The court, however, declined to either order a surcharge requiring Foy to be responsible for the payment or for Strong's alternative request for a right to sue Foy. The court found that the failure to apply for the rental diversion was a result of Foy's good faith belief that the Hebrew Center would be filing the application for same and resulted from a simple misunderstanding. Strong II, p. 2. "Further, given the extensive efforts employed by former conservator Foy to insure a safe discharge plan for the conserved person for which she was not compensated, it would be inequitable to assess a surcharge against her under these circumstances." Id. Again, Strong appealed. Additional facts will be provided as necessary.

Strong's argument on appeal are identical in nature to those raised before the Probate Court. To be clear, Strong does not suggest that Foy engaged in self-dealing or misappropriated any of Strong's assets for her own use. Strong claims that Foy failed to meet the standard of care of conservators under the circumstances presented, that is, a conserved person requiring at least temporary long-term care facility coverage and a spend down of approximately \$42,000 in personal funds in order to qualify for Medicaid long-term care coverage. Strong appeals the court's approval of the final accounting and settlement of the Hebrew Center debt, while excusing Foy from liability therefore, and its failure to order a surcharge

The present appeals are governed by General Statutes §§ 45a-186, 45a-186a (c) and 45a-186b. Section 45a-186 provides in relevant part that "(b) Any persons aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . . (d) An appeal from a decision rendered in any case after a recording of the proceedings . . . shall be on the record and shall not be a trial de novo." The present proceedings were on the record. Section 45a-186a (c) provides in relevant part that "[a]n appeal from an order, denial or decree made

after a hearing on the record under . . . sections 45a-644 to 45a-667v, inclusive . . . shall be heard by the Superior Court without a jury. . . . The appeal shall be confined to the record.”

Section 45a-186b provides in relevant part: “In an appeal taken under section 45a-186 from a matter heard on the record in the Probate Court . . . the Superior Court shall not substitute its judgment for that of the Probate Court *as to the weight of the evidence on questions of fact*. The Superior Court shall affirm the decision of the Probate Court unless the Superior Court finds that substantial rights of the person appealing have been prejudiced because the findings, inferences, conclusions or decisions are: (1) In violation of the federal or state constitution or the general statutes, (2) in excess of the statutory authority of the Probate Court, (3) made on unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. If the Superior Court finds such prejudice, the Superior Court shall sustain the appeal and, if appropriate, may render a judgment that modifies the Probate Court’s order, denial or decree or remand the case to the Probate Court for further proceedings.” (Emphasis added).

Given the near identical language in the statute authorizing appeals from administrative appeals,⁵ our Appellate Court adopted the identical standard of review for probate appeals as that applied to administrative appeals. “A court must determine whether there is substantial evidence in the . . . record to support the [Probate Court’s] findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the [Probate Court] on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the

⁵ See General Statutes § 4-183, subsections (i) and (j).

evidence, whether the [Probate Court], in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . The substantial evidence standard is satisfied if the record provides a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [D]eference [must be given] to the Probate Court's determination of the credibility of witnesses and its factual determinations." (Citations omitted; internal quotation marks omitted.) *Falvey v. Zurolo*, 130 Conn. App. 243, 257, 22 A.3d 682 (2011).

It is clear that the approval of a final accounting by the Probate Court operates to bestow quasi-judicial immunity upon a conservator that bars an action in the Superior Court after the probate proceedings are concluded. Our Supreme Court has held that "conservators are entitled to quasi-judicial immunity from liability for acts that are authorized or approved by the Probate Court." *Gross v. Rell*, 304 Conn. 234, 253, 40 A.3d 240 (2012). "When the conservator's acts are not authorized or approved by the Probate Court, however, we see no reason to depart from the common-law rule that the conservator of the estate is not acting as the agent of that court, but as the fiduciary of the conservatee, and, as such, may be held personally liable." *Id.* 253-54. "The effect of the acceptance of the account is . . . to fix the balance for which the fiduciary is answerable and the fiduciary's liability for it" D. Johnson & J. Gilbert, *Settlement of Estates in Connecticut* (3d Ed. 2021) § 9:10. It involves the adjudication of all of the fiduciary's doings and includes "any issue bearing upon the justice, propriety and legality of the entire process of the administration." *Id.*, § 9:14. "Upon the allowance of any such account, the court shall determine the rights of the fiduciaries . . . rendering the account and of the parties interested in the account" General Statutes § 45a-175 (g).

In essence, Strong seeks compensation for damages resulting from Foy's mishandling of her estate, whether ordered by the Probate Court via surcharge or by action in the Superior Court,

and claims the Probate Court erred in denying either of those remedies. The duty owed by a conservator of the estate to the conserved person is set forth in § 45a-655. "In general terms, a conservator of the estate is required to manage the conservatee's estate for the benefit of the conservatee." *Gross v. Rell*, supra, 304 Conn. 250-51. The management of the conservatee's estate carries with it the duty to protect the assets of the estate. See *Dept. of Social Services v. Saunders*, 247 Conn. 686, 708, 724 A.2d 1093 (1999) (holding that conservator, as agent of the Probate Court, has a duty to protect ward's assets). A conservator is answerable for his or her negligent failure to preserve properly the conserved person's assets. See *Murphy v. Wakelee*, 247 Conn. 396, 400, 721 A.2d 1181 (1998) (considering claim that conservator failed to protect assets by neglecting to appeal hearing officer's decision denying Medicaid benefits). The court addresses Strong's claims in order.

First, Strong asserts that the failure of Foy to fund a pooled trust, compliant with Medicaid requirements, constituted a negligent failure to preserve her assets. Our Supreme Court has observed that failure of a conservator to create a special needs trust, similar to a pooled trust, allowing the conserved person to retain Medicaid eligibility and provide for supplemental needs from the trust assets while Medicaid provides for basic medical care, may be fairly stated to have potentially been deemed to be in dereliction of the duties of the Probate Court and the conservator. *Dept. of Social Services v. Saunders*, supra, 247 Conn. 709.

In the present case, the court concludes that Foy was charged with the duty to at least investigate the funding of a pooled trust, and that probable cause to conclude that such a duty was breached is found in the record before the Probate Court. Therefore, the decision of the Probate Court to deny relief to Strong was in error.

The Probate Court had received expert testimony from Pope that the funding of a pooled trust was an option available to Strong based on her age. Tr., March 11, 2019. The court received further evidence that Strong had been found disabled by the Social Security Administration; Tr., March 27, 2019; thereby qualifying for self-funding a pooled trust while retaining eligibility for Medicaid entitlements. The Probate Court acknowledged the potential of such a trust but rejected it as a basis for potential liability on the part of Foy because “this is a strategy in the court’s experience which is seldom employed and the court cannot, as a matter of law, find that the petitioner was legally bound to file for a special needs trust under these facts.” Strong I, p. 3. The predicate for that conclusion appears to be that it was “far from clear whether or not the conserved person would be leaving skilled nursing care,” but the court acknowledged that a trust was available in a skilled nursing facility. Id.

The Probate Court additionally found that it was not clear that there would have been sufficient assets to fund such a trust and made a series of assumptions regarding potential expenditures, including court fees and expenses previously waived, payments to counsel and the conservator, the cost of a bond such that “there well may not have been any funds left to fund such a trust.” The court, however, made no findings of what the amount of the various expenditures might be and in fact no such evidence as to this, never mind substantial evidence, appears in the record. Because the Probate Court’s conclusion is not fairly and reasonably drawn from the facts presented, it involves impermissible speculation and must be reversed. See *Theodore v. Lifeline Systems Co.*, 173 Conn. App. 291, 310, 163 A.3d 654 (2017) (providing that “[b]ecause actual causation, in theory, is virtually limitless, the legal construct of proximate cause serves to establish how far down the causal continuum tortfeasors will be held liable for the consequences of their actions” [internal quotation marks omitted]). The issue of whether

Strong's remedy is properly addressed by either surcharge or rejection of the accounting is discussed below.

In Strong's view, the Probate Court erred by declining to find impropriety in Foy's failure to fund a prepaid funeral contract. The court does not agree. Although Strong testified that Foy never discussed the prepayment of funeral related expenses as part of the spend down, Foy testified that although Strong was initially unable to coherently discuss that issue, Strong ultimately opposed doing so. Resolution of that claim is informed by the stricture that the Probate Court's determination of findings of fact, when supported by substantial evidence, must be given deference. *Falvey v. Zurolo*, supra, 130 Conn. App. 257. In the present case, the Probate Court found that Foy "endeavored to obtain direction from the conserved person about a prepaid funeral contract, but the conserved person failed and/or refused to direct the petitioner to make such arrangements." Strong I, p. 3. That finding may not be disturbed.

The Probate Court's decision not to permit Strong to pursue a claim for Foy's lack of recovery of the rental rebate is based on the substantial evidence received from Attorney Hale setting forth that he had recovered that rental rebate. Strong's claim of error as to the Probate Court's denial of her request for an accounting is unavailing. The court found that the evidence before it demonstrated that Foy had accounted for all of the funds expended on behalf of Strong. In general, the purpose of accounting is "to provide the parties interested with . . . full information regarding the assets of the estate and its administration." D. Johnson & J. Gilbert, *Settlement of Estates in Connecticut* (3d Ed. 2021) § 9:8. Furthermore, "[t]he account must show the *full extent and character* of the estate so that the court can review *all that has transpired* in the administration of the estate and pass upon the propriety of the activities disclosed." (Emphasis added.) Id., § 9:13. "Its primary purpose is to show the apparent condition of the

estate and the manner in which it has been managed and to put this information in the possession of a public officer where it is open to inspection by all concerned.” Id., § 9:9. The court’s finding that Foy “fully explained how much money the conserve had and received during the conservatorship, how it was expended and how much she turned over to the new conservator” is based on the substantial evidence of the various bank and checking records, as well as those of the Hebrew Center. Therefore, the decision of the Probate Court is affirmed as to the lack of a need for an audit.

Additionally, Strong claims that the Probate Court erred in denying to allow Strong to secure relief regarding Foy’s failure to pursue a rental diversion from the Department of Social Services. The court found that the reason no application was made was due to the mistaken belief that the Hebrew Center agreed to pursue the rental diversion and, in fact, requested information required to make the application. Strong I, p. 4. That finding, however, presumes that Foy’s delegation of her obligation to pursue the diversion, however much in good faith, is a sufficient basis to acquit her of the obligation to obtain the rental diversion for her conservatee. It is not. The conservator had the obligation, in the exercise of due care, to follow up to ensure that Strong received the diversion. On that basis, the Probate Court’s initial finding in Strong I on the basis, apparently of mutual mistake, that Strong had a good defense to the outstanding debt of the Hebrew Center⁶ and that it would preserve a claim against Foy if suit was brought by the Hebrew Center, and its finding in Strong II to absolve Foy of liability for the debt, were in error.⁷

⁶ The Probate Court and Strong, through counsel; see Tr., October 13, 2019, 27:36:7; concurred that the outstanding debt to the Hebrew Center was attributable to Foy’s failure to apply for the rental diversion.

⁷ Moreover, the rationale given by the Probate Court for finding it inequitable to assess a surcharge, that Foy had employed extensive efforts to insure a safe discharge plan for Strong for which she was not compensated, finds no basis in the record.

One last task is left, whether to remand the case to the Probate Court with an order to enter a surcharge against Foy or to disapprove the accounting and permit Strong to bring an action. The latter course is favored.

In *Gaynor v. Payne*, 261 Conn. 585, 804 A.2d 170 (2002), our Supreme Court reviewed the granting of summary judgment in favor of defendants, a former executive of an estate and his law firm, in an action by an administrator of an estate for breach of fiduciary duty, negligence and breach of contract. In that case, the trial court determined that plaintiff's claims were barred by the doctrine of res judicata because plaintiff had not objected to defendants' final accounting which had been approved by the Probate Court. *Id.*, 588. The Supreme Court held that because some of the claims were brought against defendant executor in his personal capacity, rather than as executor of the estate, for the provision of legal services to plaintiff's decedent and her estate, the Probate Court did not have jurisdiction over those common law claims in its consideration of the accounting and, accordingly, principles of res judicata did not apply. *Id.*, 599.

In that case, the Supreme Court observed that "[p]robate courts are strictly statutory tribunals and, as such, they have only such powers as are expressly or implicitly conferred upon them by statute." (Internal quotation marks omitted.) *Id.*, 596. The Supreme Court further observed that General Statutes § 45a-175 (a)⁸ "invests probate courts with jurisdiction over the interim and final accounts of certain fiduciaries, including [conservators]. . . . In exercising the jurisdiction afforded by this statute, probate courts shall determine the rights of the fiduciaries or the attorney-in-fact rendering the account and of the parties interested in the account. . . . A court of probate may enforce these rights by, inter alia, surcharging the fiduciary for breach of trust. . .

⁸ General Statutes § 45a-175 (a) provides: "Probate Courts shall have jurisdiction of the interim and final accounts of testamentary trustees, trustees appointed by the Probate Courts, *conservators*, guardians, executors and administrators, and, to the extent provided for in this section, shall have jurisdiction of accounts of the actions of trustees of inter vivos trusts and agents acting under powers of attorney." (Emphasis added.)

. Because the court may not, however, award money damages generally, any cause of action seeking such a remedy must be brought in a court of general jurisdiction.”⁹ (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Id.*, 596-97.

Although the tool of a surcharge may be available to the courts of probate in instances such as that presented in this case,¹⁰ it may also simply reject the accounting and allow a claim based on negligence seeking consequential damages to proceed in the Superior Court. “The consequence of a breach of [a fiduciary’s] duty is, however, liability of the administrator, on his bond or otherwise, for any loss which ensues, even if he acted in good faith.” *Setaro v. Pernigotti*, 105 Conn. 685, 388, 136 A. 571 (1927). Over a hundred and fifty years ago, our Supreme Court articulated the process by which an accounting may be rejected in order to permit an action at law. “The proper course . . . for the court to pursue, when an account is exhibited, is, to enquire whether it is a true and just one, and embraces all the items which ought to be included, and nothing more; and if he finds it to be right, to accept and allow it; otherwise, to reject it. And if the executors neglect to present an account that is satisfactory, the proper remedy, is, to cause a suit to be instituted” *Atwater v. Barnes*, 21 Conn. 237, 244 (1851).

More recently, the Supreme Court held that the Superior Court, acting as a court of probate, acted within its jurisdiction to decline to approve a final accounting rendered by

⁹ In *Gaynor v. Payne*, 261 Conn. 585, 597 n.8, 804 A.2d 170 (2002), the court referenced G. Wilhelm, *Settlement of Estates in Connecticut* (2d Ed. 2001) § 9:18, the latest edition of which is D. Johnson & J. Gilbert, *Settlement of Estates in Connecticut* (3d Ed. 2021), for the proposition that “[i]n settling accounts, courts of probate also have the power: [1] To charge the fiduciary with property and income received but not accounted for. . . . [2] To charge the fiduciary with property and income which he or she neglected to get. . . . [3] To eliminate credit for claims allowed but not legally due. . . . [4] To eliminate credit for claims paid in the wrong order of priority. . . . [5] To eliminate credit for expenses improperly incurred, or chargeable to the fiduciary personally. . . .” (Internal quotation marks omitted.) Similar language now appears in D. Johnson & J. Gilbert, *Settlement of Estates in Connecticut* (3d Ed. 2021) § 9:15.

¹⁰ Moreover, General Statutes § 45a-175 (h) provides that “[i]n any action under this section, the Probate Court shall have, in addition to powers pursuant to this section, all the powers available to a judge of the Superior Court at law and in equity pertaining to matters under this section.”

defendant acting as executor of an estate upon the determination that there were reasonable grounds to sue the defendant in its capacity as trustee of decedent's inter vivos trust. *Ramsdell v. Union Trust Co.*, 202 Conn. 57, 72-73, 519 A.2d 1185 (1987). In *Ramsdell v. Union Trust Co.*, the plaintiffs, who were beneficiaries under the will of decedent, unsuccessfully moved for the Probate Court to remove the defendant as executor of the decedent's estate and to deny approval of defendant's inventory of the estate. *Id.* In that case, the court's order denying relief was appealed, as was a subsequent order approving defendant's final account as executor. *Id.* The basis for those appeals was the alleged misfeasance by defendant in approving the transfer of certain funds from the inter vivos trust to decedent's conservator¹¹ and the conflict of interest presented. *Id.*, 60-62.

On appeal, the Superior Court, hearing the matter de novo as a court of probate, dismissed the appeals as to the Probate Court's acceptance of the inventory and its refusal to remove the defendant as executor. *Id.*, 58-59. The Superior Court, however, sustained the appeal from the acceptance of defendant's final account. *Id.* Although the court found it lacked jurisdiction as a court of probate to consider the claims for damages and equitable relief raised in the appeals,¹² it made a non-dispositive determination that beneficiaries under the will had reasonable grounds to sue defendant in its capacity as trustee of the inter vivos trust. *Id.*, 62. On appeal to the Supreme Court, plaintiffs asserted, inter alia, that the Superior Court erred by failing to remove defendant as executor, approving the inventory and "failing to surcharge the defendant as executor for litigation expenses incurred by the estate, which expenses allegedly resulted from the defendant's negligence and misfeasance in connection with its duties as

¹¹ A judgment against the conservator in favor of the estate was ultimately rendered in the Superior Court.

¹² The exact claims for damages and equitable relief are not identified in the decision.

trustee.” Id., 62-63. Defendant cross appealed on the grounds that the trial court lacked jurisdiction to find reasonable grounds to litigate against it. Id., 63.

The Supreme Court remanded the case to the Probate Court with direction to remove defendant as executor of the estate because a conflict of interest was present given the estate’s potential claims against it as trustee, executor or both. Id., 71-72. Given that a successor fiduciary must be appointed and that such successor fiduciary might submit a new inventory and account for the Probate Court’s approval after potential claims against defendant were considered, a failure to surcharge defendant was harmless. Id., 72.

In that case, the court next considered the claim that the trial court exceeded its jurisdiction in determining that plaintiffs had reasonable grounds to litigate against defendant. That argument was rejected on the grounds that the jurisdiction of the trial court, sitting as a court of probate, “was limited to that conferred on the Probate Court and that the plaintiffs’ claims for money damages and equitable relief against the defendant should be brought in a court of general, rather than limited, jurisdiction. The [trial] court made its probable cause determination for the sole purpose of determining whether it should accept the defendant’s final account, or refuse to accept it pending the resolution of the plaintiffs’ claims in a court of general jurisdiction. Undoubtedly the [trial] court had jurisdiction to approve or deny the defendant’s final account. . . . Incident to that power, the [trial] court had the authority to make a nondispositive determination that the plaintiffs had reasonable grounds to sue the defendant in a court of general jurisdiction.” (Citations omitted; footnote omitted.) Id., 72-73.

The foregoing renders it evident that a court of probate, in the exercise of its statutory authority to approve or disapprove of a final accounting pursuant to § 45a-175, may either order a surcharge against a conservator or decline to approve the accounting and find probable cause

for liability on the part of the conservator in his or her management of the conserved person's affairs.

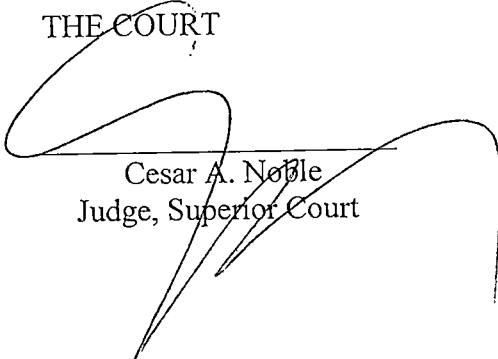
The office of a surcharge is ill-defined. In general, a surcharge is "[t]he amount that a court may charge a fiduciary that has breached its duty." Black's Law Dictionary, (8th Ed. 2003) p. 1482. The court's research has found no statutory authority in this state for its exercise other than an almost casual mention of the device in General Statutes § 45a-372 (b), which addresses the presentation of claims against a fiduciary. Section 45a-372 (b) provides that "[f]ollowing final distribution of all assets known to a fiduciary, any suit on an unsatisfied obligation described in subsection (a) of section 45a-368 shall be brought against beneficiaries and not against the fiduciary, unless the plaintiff is seeking to have the fiduciary personally surcharged." No other description of its use appears in the statutes. Neither this court's research nor that of the parties have identified statutory standards for its application. Rule 71.1 of the Probate Court Rules provides that "[a] fiduciary who fails to perform his or her duties or comply with an order of the court shall be subject to removal, disallowance of fees, surcharge, contempt of court and other sanctions permitted by law." The standard of the "failure to perform his or her duties" as a basis for surcharge is unhelpfully broad because it provides no specific guidance.

In the present case, it is not necessary for this court to resolve this ambiguity because the court concludes that the court's approval of the accounting should be reversed as well as its order releasing Foy from "all activity evidenced in the [account]." The present conservator will be at liberty to bring a claim against Foy, which this court finds has a basis in probable cause, for the failure to investigate and/or pursue a pooled trust and the failure to secure a rental diversion. An action for general damages in the Superior Court is, in the present circumstances, preferable to a surcharge given the full panoply of rules and rights available in the Superior Court that are not



present in the context of the Probate Court proceedings. Those include, but are not limited to, a right to trial by jury and liberal discovery.

For the foregoing reasons, the court reverses the finding of the Probate Court approving Foy's accounting pending the resolution of any claims brought against Foy for negligence or malpractice in the management of Strong's estate related to the failure to investigate and/or fund a pooled trust and the failure to secure a rental diversion. All other grounds of the appeal are dismissed.

THE COURT



Cesar A. Noble
Judge, Superior Court

State of Connecticut Judicial Branch Superior Court Case Look-up																																														
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HENRIQUES, JESSICA Et Al</p> <p>Prefix: HD4 Case Type: W00 File Date: 12/23/2019 Return Date: 12/24/2019</p> <p>Case Detail Notices History Scheduled Court Dates E-Services Login Screen Section Help Exhibits</p> <p>To receive an email when there is activity on this case, click here.</p> <p>This case is consolidated with one or more cases</p> <p>Information Updated as of: 06/30/2021</p> <table border="1"> <thead> <tr> <th>Case Information</th> </tr> </thead> <tbody> <tr> <td>Case Type: W00 - Wills - Probate Appeals</td> </tr> <tr> <td>Court Location: HARTFORD JD</td> </tr> <tr> <td>List Type: COURT (CT)</td> </tr> <tr> <td>Trial List Claim: 08/31/2020</td> </tr> <tr> <td>Last Action Date: 02/11/2021 (The "last action date" is the date the information was entered in the system)</td> </tr> </tbody> </table> <table border="1"> <thead> <tr> <th>Disposition Information</th> </tr> </thead> <tbody> <tr> <td>Disposition Date:</td> </tr> <tr> <td>Disposition:</td> </tr> <tr> <td>Judge or Magistrate:</td> </tr> </tbody> </table> <table border="1"> <thead> <tr> <th>Party & Appearance Information</th> </tr> </thead> <tbody> <tr> <td> <table border="1"> <thead> <tr> <th>Party</th> <th>No Fee Party</th> <th>Category</th> </tr> </thead> <tbody> <tr> <td>P-01 IN THE MATTER OF RUTH STRONG APPEAL FROM NEWINGTON PROBATE COURT</td> <td></td> <td>Plaintiff</td> </tr> <tr> <td colspan="3"> <p>Attorney: VIRGINIA MARTINS TEIXEIRA (433079) File Date: 12/23/2019 BEERS HALL, 2ND FLOOR P.O. 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JUN 30 2021

HARTFORD J.D.

Checklist for Clerk

Docket Number: HHD-CV-19-5062776 :

Case Name: Strong appeal

Memorandum of Decision dated: 6/30/2021

File Sealed: Yes No X

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